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VIA TELECOPIER

Honorable Tom Davis, Chairman
Committee on Government Reform
U.S. House of Representatives
2157 Rayburn House Office Building
Washington DC 20515

Hon. Henry A. Waxman, Ranking Member
Committee on Government Reform
House of Representatives
B-350A Rayburn House Office Building.
Washington, DC 20515

Re: Gulf of Mexico defective deep water drilling leases

Gentlemen:

As a citizen and taxpayer, I read with some dismay the story in today's New York Times about the decision of the Department of the Interior to drop claims that the Chevron Corporation has systematically underpaid the government for natural gas produced in the Gulf of Mexico. But, as an attorney with over 45 years of experience with complex commercial litigation, I do not challenge the legal conclusion of the Department's Minerals Management Service that these claims have little or no chance of success.

However, I strongly disagree with the legal basis for MMS's earlier determination to do nothing to recover more than $7 billion in royalty payments that the government stands to lose as a result of defective oil and gas leases entered into during 1998 and 1999. In September, Inspector General Earl Devaney testified before the Subcommittee on Energy and Resources that these flawed leases had been entered into by mistake. That is, provisions normally included in similar leases requiring the payment of royalties when certain oil and gas price thresholds had been crossed, had been carelessly omitted by MMS personnel from these leases. According to a September 22 Times story, Director Johnnie M. Burton took the position that MMS had signed legally binding contracts with the oil companies which could not be changed. "MMS messed up. Yes, it was a mistake. We have to live with it," she said. After conducting an extensive investigation, the Subcommittee was highly critical of MMS and called for disciplinary action.

MMS is wrong. The United States Congress and American taxpayers do not have to live with this mistake. Solid grounds exist to overturn the decision of MMS not to take any legal action to set aside or reform these defective contracts.

- **The inclusion of price thresholds in offshore drilling leases is mandatory under applicable law, not discretionary.**

The grant of discretion to the Secretary to reduce or eliminate royalties in certain offshore drilling leases in order to promote increased production on the leased areas is set forth in the Deep Water Royalty Relief Act ("RRA"), 43 U.S.C. § 1337 (a)(3)(A). That section must be read together with other sections of the RRA, which limit that discretion, *i.e.*, §§ 1337(a)(3)(C)(ii), (v), and (vi). The first subsection requires the Secretary to determine the volume of production from the lease or unit on which no royalties would be due in order to made new production economically viable, subject to minimum production levels. The other subsections clearly and unambiguously provide that during the production of such volume, in any year during which the price of oil exceeds $28.00, and the price of natural gas exceeds $3.50 per million BTUs, any production will be subject to royalties. (These price thresholds have subsequently been increased pursuant to authority granted by Congress in § 1337(a)(3)(C)(vii).)

It is axiomatic that "individual sections of a single statute should be construed together." *Erlenbaugh v. United States*, 409 U.S. 239, 244 (1972). A particular provision must be analyzed in connection with the whole statute "and the objects and policy of the law, as indicated by its various provisions, and give it such construction as will carry into execution the will of the legislature." *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974).

In *Chevron U.S.A., Inc. v. Natural Res. Def. Council Inc.*, 467 U.S. 837 (1984), the Supreme Court held that:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.

In *Santa Fe Snyder Corp. v. Norton*, 385 F.3d 884 (5th Cir. 2004), plaintiffs, oil and gas lessees, challenged the Secretary's interpretation of the RRA in implementing certain regulations which plaintiffs asserted were contrary to Congress's statutory direction. The district court held that Interior's regulations violated the RRA and were therefore null and void, and that the lessees were entitled to royalty relief. The Fifth Circuit affirmed, holding:

> The district court read the discretion granted in [Section 303 of the RRA, § 1337(a)(1)] as being limited by Section 304 of the RRA

> [§ 1337(a)(3)(C)(iii)] because that provision overrides the § 1337(a)(1) discretion by specifying the minimum amount of royalty suspension to be applied on a volume basis for the class of New Leases described in Section 304. We agree. This interpretation gives meaning to both sections 303 and 304 of the RRA. Section 304 requires the Interior to use the bidding system in Section 303 which includes discretionary royalty suspension "for a period, volume, or value of production determined by the Secretary." That section, however, immediately excepts and replaces Interior's discretion with a fixed royalty suspension for New Leases on a volume basis by providing, "except that the suspension of royalties shall be set at a volume of not less than the following" (followed by amounts which vary based on water depth). The Interior's regulation imposing a New Production Requirement on New Leases has no statutory support.

Id. at 892 (footnote omitted).

- **A government contract not authorized by statute may be set aside or reformed on grounds of ultra vires and mistake.**

Generally, a provision in a government contract that violates or conflicts with a federal statute is invalid or void. *See, e.g., Urban Data Sys., Inc. v. United States*, 699 F.2d 1147, 1150-53 (Fed. Cir. 1983) (price adjustment clauses violating federal statute were invalid); *Yosemite Park v. United States*, 217 Ct.Cl. 360, 582 F.2d 552, 560 (1978) (provision violating federal procurement law is an "invalid, unenforceable provision of the Agreement"). *See also American Airlines, Inc. v. Austin*, 75 F.3d 1535, 1538 (Fed. Cir. 1996) (terms and conditions on airline tickets limiting refunds to which the Government was entitled by statute were invalid).

> A contract with the United States government also requires that the Government representative who entered into or ratified the agreement had actual authority to bind the United States. Anyone entering into an agreement with the Government takes the risk of accurately ascertaining the authority of the agents who purport to act for the Government, and this risk remains with the contractor even when the Government agents themselves may have been unaware of the limitations on their authority.

Trauma Serv. Group v. U.S., 104 F.3d 1321 (Fed. Cir. 1997).

> It is well established that the government is not bound by the acts of its agents beyond the scope of their actual authority. Contractors dealing with the United States must inform themselves of a representative's authority and the limits of that authority.

Harbert/Lummus Agrifuels Projects v. U.S., 142 F.3d 1429 (Fed. Cir. 1998).

> When the United States is a party [to a contract] . . . the Government representative whose conduct is relied upon must have actual authority to bind the government in the contract.

City of El Centro v. U.S., 922 F.2d 816 (Fed. Cir. 1990).

- **The RRA provides that a citizen suit may be brought to compel compliance by the Secretary of the Interior, but serious standing questions arise under present circumstances.**

43 U.S.C. § 1349, entitled "Citizens Suits, Jurisdiction and Judicial Review," provides, in pertinent part, as follows:

> (a) (1) [With exceptions not applicable] any person having a valid legal interest which is or may be adversely affected may commence a civil action on his own behalf to compel compliance with this subchapter against any person, including the United States, and any other government instrumentality or agency (to the extent permitted by the eleventh amendment of the Constitution) for any alleged violation of any provision of this subchapter or any regulation promulgated under this subchapter, or the terms of any permit or lease issued by the Secretary under this subchapter.
>
> (2) [With exceptions not applicable], no action may be commenced under subsection (a)(1) of this section –
>
> > (A) prior to sixty days after the plaintiff has given notice of the alleged violation, in writing under oath, to the Secretary and any other appropirate (sic) Federal official . . . and to any alleged violator; or
> >
> > (B) if the Attorney General has commenced and is diligently prosecuting a civil action in a court of the United States or a State with respect to such matter . . .

* * *

(4) In any action commenced pursuant to this section, the Attorney General, upon the request of the Secretary of any other appropriate Federal official, may intervene as a matter of right.

* * *

The statutory requirement that in order to sue, a person must have "a valid legal interest which is or may be adversely affected" would seem to deny standing **to anyone other than a lessee** to compel the Secretary to take action to rescind or reform the defective leases.

In *Watt v. Energy Action Education Foundation*, 454 U.S. 181, 102 S.Ct. 205, 70 L.Ed.2d 309 (1981), Justice O'Connor, writing for a unanimous Court, held that the State of California had standing under 43 U.S.C. §1349 to challenge the Secretary's choice of bidding systems. Individual plaintiffs had also joined in the action below, claiming standing as taxpayers, but the Court held that "because we find California has standing, we do not consider the standing of the other plaintiffs."

Recently, in *DaimlerChrysler v. Cuno*, 126 S.Ct. 1854 (May 15, 2006), the Supreme Court severely limited most taxpayer suits, holding that plaintiffs, Ohio taxpayers, lacked standing to challenge investment tax credits and tax waivers granted to DaimlerChrysler by taxing authorities. Unlike the present situation, the Ohio authorities did have discretion to take the actions challenged by plaintiffs. Here, MMS had no discretion to violate the express provisions of the RRA. Under 43 U.S.C. §1349, someone ought to have standing to challenge the Secretary's refusal to rescind or reform the mistaken leases. Yet, what person might have the requisite "valid legal interest"is unclear.

What is clear is that the Attorney General can and should take action. I urge you both to write him and demand that he do so. If he, too, refuses, then I urge you both to propose remedial legislation so that American taxpayers will not have to pay for this multi-billion dollar mistake.

Please feel free to have your counsel contact me to discuss this matter further.

Sincerely,

Stephen Lowey

SL:jws

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